IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARISELA NAVARRO,
Appellant.

No. 2 CA-CR 2017-0161
Filed November 21, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20160497001
The Honorable Jane L. Eikleberry, Judge
The Honorable James E. Marner, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

COUNSEL

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Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

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Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Eppich and Chief Judge Eckerstrom concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Marisela Navarro was convicted of fraudulent schemes and artifices, two counts of theft, and eight counts of forgery. On appeal, she argues the trial court erred in several evidentiary rulings and by failing to provide a requested jury instruction. She also argues the court illegally sentenced her as a repetitive offender and violated her double jeopardy rights by entering two convictions for theft arising from the same scheme. For the following reasons, we vacate the sentences on the fraud and theft counts and remand for resentencing, but otherwise affirm her convictions and remaining sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). In 2011, Navarro began working for S.B., providing companionship, going grocery shopping for her, and accompanying her to appointments at a rate of nine dollars per hour. In 2012, S.B.'s doctor noted "she was beginning to present with mild cognitive memory loss." He did not think she was capable of understanding her "finances or was able to make medical decisions."

¶3 Navarro stopped working for S.B. in August 2013. Beginning in September, Navarro continued to visit S.B. and collect checks, despite not providing any services. In July and August 2014, Navarro also took several blank checks from S.B.'s home, forging and cashing them. In August 2014, S.B.'s daughter placed a hold on both of S.B.'s bank accounts and alerted the Pima County Sheriff's Department to the thefts and forgeries. Adult Protective Services (APS) also opened an investigation, and Navarro told the APS investigator she had "[written] out several checks and forged [S.B.'s] name." Shortly thereafter, S.B. was hospitalized several times and later died in February 2015.

¶4 A grand jury indicted Navarro for fraudulent schemes and artifices, two counts of theft of a vulnerable adult, eight counts of forgery, and one count of identity theft. The jury convicted Navarro as described

above.[1] The trial court sentenced Navarro to concurrent sentences, the longest of which is 6.5 years. We have jurisdiction over her appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

F.D.'s testimony

¶5 Navarro first contends several statements F.D. made while testifying were inadmissible hearsay or, alternatively, constituted impermissible lay opinion. However, because she did not object to any of this testimony below, we limit our review to fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). Navarro bears the burden of proving both that the error was fundamental and that it caused her prejudice. *See id.* ¶ 21. "Because fundamental error review is a fact-intensive inquiry, the showing necessary to demonstrate prejudice will vary on a case-by-case basis." *State v. Valverde*, 220 Ariz. 582, ¶ 12 (2009), *abrogated on other grounds by Escalante*, 245 Ariz. 135, ¶¶ 15-16.

¶6 Navarro contends F.D.'s testimony that S.B. told her Navarro earned nine dollars per hour and that S.B. paid her each day was impermissible hearsay and does not fall within the "residual exception" of Rule 807, Ariz. R. Evid. However, even the erroneous admission of testimony may be harmless, and thus not prejudicial, if it is cumulative to other properly admitted evidence. *See State v. Williams*, 133 Ariz. 220, 226 (1982); *see also State v. Martin*, 225 Ariz. 162, ¶ 15 (App. 2010). At trial, Navarro also testified that S.B. initially paid her nine dollars an hour, explaining that S.B. gave her a few raises through July 2014 and, in 2013, began paying her additional lump sums for specific tasks. She also testified that S.B. paid her either every day or every two days. Because F.D.'s testimony was cumulative to Navarro's own testimony, she has not met her burden of demonstrating she was prejudiced by this testimony. *See Escalante*, 245 Ariz. 135, ¶ 21; *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005).

¶7 As to the other testimony Navarro challenges, she likewise has not explained how the statements prejudiced her. She summarily states the "errors were clear and egregious . . . because they were so numerous and because they were so obvious." By failing to argue how these additional alleged errors prejudiced her, she has failed to meet her burden

[1]On the third day of trial, the trial court granted the state's motion to amend the counts of theft of a vulnerable adult to simple theft.

of demonstrating fundamental, prejudicial error.[2] *See Escalante*, 245 Ariz. 135, ¶ 21. To the extent she implies the sheer number of claimed errors establishes prejudice, we do not recognize the doctrine of cumulative error except in the context of prosecutorial misconduct. *See State v. Hughes*, 193 Ariz. 72, ¶ 25 (1998); *see also State v. Parker*, 231 Ariz. 391, ¶ 81 (2013).

Involuntariness

¶8 Navarro next contends the trial court "abused its discretion in refusing a jury instruction on [the] voluntariness of . . . Navarro's statements" to the APS investigator.[3] "We review a court's refusal to give a requested jury instruction for an abuse of discretion, but consider de novo whether the instructions given were legally sufficient when viewed as a whole." *State v. Causbie*, 241 Ariz. 173, ¶ 15 (App. 2016) (footnote omitted).

¶9 During her testimony, the APS investigator quoted Navarro as saying about her forgery of some of S.B.'s checks: "I know that was wrong, what will happen to me?" While settling the final jury instructions, Navarro requested an instruction directing the jurors that they may "not consider any statements made . . . to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily." Rev. Ariz. Jury Instr. Stand. Crim. 6 (4th ed. 2018).[4] That instruction also provides a list of factors to consider in determining whether the statements were made voluntarily. *Id.*

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[2]In her reply brief, Navarro explains the prejudice the statements caused her. We do not, however, consider arguments raised for the first time in a reply brief. *See State v. Brown*, 233 Ariz. 153, ¶ 28 (App. 2013).

[3]Navarro does not challenge on appeal the admissibility of her statements; we therefore do not address this issue.

[4]The state asserts this issue is waived because Navarro did not provide her requested instruction below. *See* Ariz. R. Crim. P. 21.2 (parties must submit requested instructions in writing). A review of the transcript shows, however, that all parties were looking at the same set of instructions prepared by the trial court that were based on the standard jury instructions. It was, in fact, the court's suggestion to delete this particular instruction that prompted Navarro's objection. The court was thus aware of the content of Navarro's proposed instruction, *see* Rev. Ariz. Jury Instr. Stand. Crim. 6, and this issue is not waived.

¶10 Navarro stated:

> My concern is the statement to the [APS investigator]. I guess she's like an administrative officer, so she's not technically a law enforcement officer. But I think in order to give that statement—and maybe this is more appropriate[ly] dealt with in arguments. But certainly there would have to be a finding that it was a voluntary statement and she understood it and all of that.

The trial court denied Navarro's request, finding the instruction did not "apply to that investigator because she's not law enforcement."

¶11 Navarro argues the trial court erred by only considering the fact that the APS investigator "is not a law enforcement officer *per se*" and "by ending the inquiry at that point." She contends the court "should have considered whether [Navarro] would have perceived [the investigator] as '. . . an administrative officer' or as a law enforcement officer." She does not, however, cite any legal authority for the proposition that giving the instruction hinges on the defendant's subjective perception, nor can we find any. *Cf. State v. Fulminante*, 161 Ariz. 237, 241, 243-44 (1988) (failure to instruct jury paid inmate informant tasked with questioning defendant was "law enforcement officer" when evidence of coercion present constituted error); *State v. Lucero*, 223 Ariz. 129, ¶¶ 2-4, 15 (App. 2009) (United States Army Criminal Investigations Division sergeant interrogating defendant on behalf of local police was "law enforcement" for purposes of instruction). Based on this alone, we could deem the issue waived. *See State v. Martin*, 225 Ariz. 162, n.6 (App. 2010).

¶12 Even if the issue were not waived, however, no error occurred. To the extent Navarro argues the APS investigator should be viewed like the paid informant in *Fulminante*, we disagree. In *Fulminante*, the inmate informant was paid by law enforcement and specifically directed to get information from the defendant. 161 Ariz. at 243-44. The informant did so by offering the defendant protection from "physical harm at the hands of other inmates." *Id.* at 243.

¶13 In this case, the APS investigator was working on behalf of her agency—not law enforcement—to determine if Navarro had exploited S.B., and, if the investigator substantiated those claims, her agency would

place Navarro's name on a public registry. The investigator's "primary focus" was "to make sure that [vulnerable adults] are safe, that they're not being exploited, neglected or abused." This is not comparable to a paid informant using coercion and the threat of physical harm to gain information at law enforcement's behest.

¶14 But even if the APS investigator could be considered a law enforcement agent, after she identified herself, Navarro responded that she was comfortable speaking with her. *See State v. Newell*, 212 Ariz. 389, ¶ 39 (2006) (statement involuntary when "given the totality of the circumstances, the defendant's will was overborne"); *see also State v. Winters*, 27 Ariz. App. 508, 511 (1976) ("A statement induced by fraud or trickery is not made involuntary unless there is additional evidence indicating that the defendant's will was overborne or that the confession was false or unreliable."). Navarro's reliance on *Fulminante* is unavailing.

¶15 When viewed as a whole, the instructions were sufficient to address any concerns on this issue. The trial court instructed the jury on its duty to weigh the evidence and assess witness credibility, the presumption of innocence, and the state's burden to prove all the elements of the crimes beyond a reasonable doubt. *See Causbie*, 241 Ariz. 173, ¶ 15; *see also State v. Eddington*, 226 Ariz. 72, ¶ 31 (App. 2010) (court presumes jurors follow instructions). The court did not abuse its discretion by refusing to provide an instruction that was not applicable to the facts of the case. *Cf. State v. Rodriguez*, 192 Ariz. 58, ¶ 16 (1998) (party entitled to instruction on any theory "reasonably supported by the evidence").

Prosecutorial Misconduct

¶16 Navarro argues the prosecutor committed three acts of misconduct, which ultimately deprived her of a fair trial. Because she did not object to any of these instances below, we review for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also State v. Ramos*, 235 Ariz. 230, ¶ 8 (App. 2014).

¶17 To determine whether a prosecutor's remarks are improper, we consider whether they called attention to matters jurors should not consider and the probability they were influenced by the remarks. *State v. Hulsey*, 243 Ariz. 367, ¶ 109 (2018). "Prosecutorial misconduct constitutes fundamental error only when it is 'so egregious as to deprive the defendant of a fair trial.'" *State v. Woody*, 173 Ariz. 561, 564 (App. 1992) (quoting *State v. Hernandez*, 170 Ariz. 301, 307 (App. 1991)).

¶18 The first instance of alleged prosecutorial misconduct occurred during the state's cross-examination of Navarro. The prosecutor asked her several questions about the fact that she never showed up for a meeting she had scheduled with the investigating detective on this case. He then asked, "If you had kept your Thursday appointment with [the detective] and gave him your side of the story . . . , couldn't we have avoided this trial?" The trial court sustained Navarro's objection.

¶19 Navarro contends the prosecutor impermissibly attempted to impeach Navarro with her "invocation of the right to remain silent." As she points out, in *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), the Supreme Court held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda*[5] warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." In *Jenkins v. Anderson*, 447 U.S. 231, 235-38 (1980), however, the Supreme Court explained that a prosecutor may comment on a defendant's *pre-arrest* silence for impeachment purposes when a defendant chooses to testify in her own defense.[6] This is precisely what occurred in this case.

¶20 Here, Navarro had not yet been arrested or read her *Miranda* rights when she cancelled her meeting with the detective. Rather, she stated that she had cancelled the meeting to "see how things c[a]me out or unfolded." Consequently, "no governmental action induced [her] to remain silent," and "the fundamental unfairness present in *Doyle* is not present in this case." *Jenkins*, 447 U.S. at 240. Furthermore, by choosing to testify, Navarro risked the prosecutor's attempts to impeach her credibility on cross-examination with her decision to not meet with detectives during the investigation. *See id.* at 238. Navarro has thus failed to show that any error occurred by this line of questioning.

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[5]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[6]We recognize that in *State v. Lopez*, 230 Ariz. 15, ¶¶ 15-16 (App. 2012), this court held that even when a defendant does not testify in her own defense, "a defendant's pre-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt." Because Navarro testified at trial, we do not rely on *Lopez*. We note, however, that in *Salinas v. Texas*, a plurality of the Supreme Court confirmed: "A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." 570 U.S. 178, 188 (2013). But, as relevant here, the Court also stated that even if "the Fifth Amendment privilege is the most likely explanation for [a defendant's pre-arrest] silence,""such silence is 'insolubly ambiguous.'" *Id.* at 189 (quoting *Doyle*, 426 U.S. at 617).

¶21 Navarro next argues the prosecutor impermissibly shifted the burden of proof to her. During closing arguments, the prosecutor reviewed the *Portillo* instruction, which states, in part:

> If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

State v. Portillo, 182 Ariz. 592, 596 (1995). The prosecutor went on to say, "[T]he flip side of that is in order to find her not guilty, you have to find that there is a . . . real possibility that the defendant did not commit these offenses." Navarro argues this comment impermissibly "implied that [she] had a burden of persuasion as to the issue of reasonable doubt."

¶22 Although not the most artful phrasing, the prosecutor's comment was effectively a restatement of the *Portillo* instruction and did not shift the burden to Navarro. We will not assume the jury interpreted the prosecutor's statement in a manner that was the most damaging to the defendant. *See Houston v. Roe*, 177 F.3d 901, 909 (9th Cir. 1999) (reviewing "court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations" (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974))).

¶23 Moreover, just before making this statement, the prosecutor told the jury, "I have the burden of proof. The state has to prove this beyond a reasonable doubt." The prosecutor also repeatedly referred to the trial court's instructions, which also informed the jurors that the state bore the burden of proving all the elements of the crimes and that Navarro was presumed innocent and that she was not required "to prove her innocence or to produce any evidence." We presume jurors follow their instructions. *State v. Almaguer*, 232 Ariz. 190, ¶ 29 (App. 2013). Under these circumstances, there was not a high probability that the prosecutor's single remark influenced the jury. *See Hulsey*, 243 Ariz. 367, ¶ 109.

¶24 Navarro next contends the prosecutor impermissibly vouched for a witness during closing arguments by telling the jury the APS

investigator had "substantiated the claim of exploitation." When recounting the APS investigator's testimony, the prosecutor stated:

> Ultimately, her testimony was that adult protective service's primary mission was to make sure that the elders['] . . . needs were met. And the primary one was that they were safe. There wasn't any additional . . . duties except that when she made an investigation into exploitation in this case they just have to determine whether they are going to substantiate or not substantiate a claim of exploitation. And in this case, she substantiated that claim. She found that there was exploitation in this case per the standards of her organization.

¶25 The prosecutor did not impermissibly "place[] the prestige of the government behind" the investigator or misstate the evidence. *State v. Haverstick*, 234 Ariz. 161, ¶ 7 (App. 2014). The APS investigator testified that she "substantiated that exploitation had taken place and that . . . Navarro had done it."[7] Contrary to Navarro's assertions, this was not a suggestion "that the jury's decision [of guilt] was more of a ministerial act." We agree with the state's assertion that APS's "substantiat[ion of] an exploitation claim under its own standards does not imply that the elements of all twelve charges against Navarro had been proven beyond a reasonable doubt." Additionally, any potential error was cured by the jury's instructions that "[w]hat the lawyers say is not evidence." *See State v. Manuel*, 229 Ariz. 1, ¶¶ 23-24 (2011) (instructing jury that attorney arguments not evidence cured prejudice from prosecutor's "argumentative comments"); *see also State v. Lamar*, 205 Ariz. 431, ¶ 54 (2003) (prosecutorial vouching "ameliorated" by instruction that attorney arguments not evidence).

¶26 Navarro also asks this court to consider "the cumulative effect of the errors." However, after assessing each claim individually, we conclude none of the comments Navarro challenges constitute error. *See*

[7] Again, Navarro has not challenged the admissibility of this testimony. We therefore do not address that issue.

Hulsey, 243 Ariz. 367, ¶ 88. Because no error occurred, there can be no cumulative error. *See id.*; *see also Hughes*, 193 Ariz. 72, ¶¶ 25-26.

Other-Acts Evidence

¶27 Navarro contends the admission of checks written outside the date range of the charges in the indictment constituted improper other-acts evidence. *See* Ariz. R. Evid. 404(b). Her failure to object below has forfeited review for all but fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12.Rule 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*; *see also State v. Van Adams*, 194 Ariz. 408, ¶ 20 (1999).

¶28 Rule 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*; *see also State v. Van Adams*, 194 Ariz. 408, ¶ 20 (1999).

¶29 Count one of the indictment alleged that "[b]etween September 2013 and August 2014," Navarro committed fraudulent schemes and artifices. Count two alleged that Navarro committed theft from S.B.'s U.S. Bank account from September 2013 to May 2014. And count three alleged that Navarro committed theft from S.B.'s Wells Fargo bank account from January 2014 to August 2014. The eight forgery counts relate to checks written in July 2014 and August 2014.

¶30 At trial, the state asserted that Navarro had stopped working for S.B. in August 2013, and therefore all the checks written to Navarro after September were either forged or obtained by fraudulent means. It offered into evidence, without objection, copies of checks written on S.B.'s bank accounts dating back to March 2011. Some of the checks were made out to Navarro and others to different businesses and individuals.

¶31 Navarro argues the checks that predate September 2013 constitute "uncharged acts" and were irrelevant and unfairly prejudicial. However, even assuming the admission of the pre-indictment checks was erroneous, Navarro has not demonstrated prejudice. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶32 F.B. testified that Navarro was paid nine dollars per hour and that, despite not working for S.B. after August 2013, she continued to visit her through August 2014. She also testified her knowledge of those facts came from conversations with S.B.—who suffered from cognitive memory loss—and her review of S.B.'s day planner.

¶33 Navarro testified that although she began working for S.B. at nine dollars per hour, S.B. gave her yearly raises and by July 2014, she was earning fifteen dollars per hour. She stated that as time went on, she began providing more services, such as cooking for and feeding S.B., bathing and dressing her, driving her to stores and appointments, and doing housework. According to her, by 2014, she sometimes spent the night at S.B.'s home. Navarro also said that, on top of her hourly rate, S.B. would pay her lump sums for certain services. She reviewed each of the checks the state alleged had been forged and explained what services she provided to earn that amount, and she asserted that S.B. had written those checks. She also testified that she sometimes did help S.B. write checks, but only when S.B. would become tired and needed to sit while paying for groceries.

¶34 In sum, the jury was faced with two versions of events: either it believed the state that Navarro stopped working for S.B. in August 2013 and therefore all the checks written out to Navarro after that date were either forged or fraudulently obtained, or it believed Navarro that she continued working for S.B. through 2014 and that S.B. gave her several raises in addition to lump sum payments for certain services justifying the amounts. This case thus came down to an assessment of credibility, which is entirely within the province of the jury, *see State v. Dixon*, 216 Ariz. 18, ¶ 10 (App. 2007), and the admission of the pre-September 2013 checks had no bearing on that determination.[8] Under these circumstances, Navarro

[8] As the state points out, it "did not assert, or even imply, that Navarro had written all 118 of the cancelled US Bank checks that predated the indictment[;] . . . no wrongdoing is even implied until the second half of 2012." Additionally, "Rule 404 permits the introduction of evidence of 'other' possibly prejudicial acts if a proper purpose is shown under subsection 404(b)." *Hulsey*, 243 Ariz. 367, ¶ 45. We agree with the state's argument that the pre-2013 cancelled checks were "relevant to show that Navarro had the opportunity to commit the charged offenses, that she prepared and planned to do so, and that she did not do so by mistake or accident." *See* Ariz. R. Evid. 404(b). Because Navarro has not established any prejudice, she thus cannot show the probative value of the checks is substantially outweighed by a danger of unfair prejudice. *See* Ariz. R.

has not met her burden of showing that any error in admitting the additional checks prejudiced her. *See Escalante*, 245 Ariz. 135, ¶ 21.

Sentencing

¶35 Navarro argues the trial court "illegally sentenced [her] as a repetitive offender." Pursuant to A.R.S. § 13-703(A),

> If a person is convicted of multiple felony offenses that were not committed on the same occasion but that . . . are consolidated for trial purposes[,] . . . the person shall be sentenced as a first time felony offender pursuant to [A.R.S.] § 13-702 for the first offense, as a category one repetitive offender for the second offense, and as a category two repetitive offender for the third and subsequent offenses.

Because Navarro did not raise this issue until her motion to vacate the judgment and sentence, our review is limited to fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12; *State v. Mendoza*, 181 Ariz. 472, 474 (App. 1995) (where defendant first raised issue in motion to vacate judgment, issue forfeited for all but fundamental error). An illegal sentence, however, constitutes fundamental error. *State v. Thues*, 203 Ariz. 339, ¶ 4 (App. 2002).

¶36 First, Navarro maintains the "trial court fundamentally erred by enhancing [her] sentences based on an allegation that was never made according to legal requirements." Specifically, she contends the state "failed to provide notice of its intent to prove that the offenses were not committed on the same occasion but consolidated for trial." We disagree.

¶37 "Our supreme court has held that a 'reference in the indictment to the number of the statute providing for enhanced punishment . . . is adequate notice of the state's intent to enhance [the defendant's] sentence under that statute.'" *State v. Hollenback*, 212 Ariz. 12, ¶ 11 (App. 2005) (quoting *State v. Waggoner*, 144 Ariz. 237, 239 (1985)) (alteration in *Hollenback*). The indictment in this case listed § 13-703 for each

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Evid. 403. Lastly, Navarro did not request a limiting instruction under Rule 105, Ariz. R. Evid., so the court was not required to give one sua sponte. *See State v. Lee*, 189 Ariz. 590, 599 (1997).

of the alleged offenses. Navarro attempts to distinguish *Hollenback* on the basis that *Hollenback*, 212 Ariz. 12, ¶¶ 9, 11, dealt with a dangerous crimes against children allegation under what is now A.R.S. § 13-705, not § 13-703, and that it "took . . . out of context" *Waggoner*, 144 Ariz. at 238-39, which addressed an allegation pursuant to then-existing A.R.S. § 13-604.01 that the offense was committed while on parole. We do not read *Hollenback* and *Waggoner* so narrowly. *See State v. Francis*, 224 Ariz. 369, ¶¶ 9-15 (App. 2010) (discussing *Waggoner* in context of sentencing enhancements for certain drug offenses under A.R.S. § 13-3419).

¶38 Additionally, at a pretrial hearing, while the parties were discussing the potential prison sentences that Navarro faced, the prosecutor explained that because of the "13-703 allegations," Navarro would be sentenced to prison "if she loses at trial." Navarro therefore had notice of the § 13-703 allegation, and no error, fundamental or otherwise, occurred. *See Escalante*, 245 Ariz. 135, ¶ 21; *see also Mendoza*, 181 Ariz. at 474.

¶39 Second, she asserts the trial court erred by enhancing her sentences for counts one through three because the jury should have determined whether those offenses had been committed on separate occasions or consolidated for trial. This presents a mixed question of fact and law, which we review de novo. *See State v. Derello*, 199 Ariz. 435, ¶ 8 (App. 2001).

¶40 As mentioned above, count one alleged Navarro committed fraudulent schemes and artifices "[b]etween September 2013 and August 2014." Count two alleged Navarro committed theft from S.B.'s U.S. Bank account "[b]etween September 2013 and May 2014," while count three alleged the theft from S.B.'s Wells Fargo account occurred from "January 2014 and August 2014." Because the dates for the two theft charges overlapped, the trial court included an interrogatory with the verdict forms asking the jury to indicate, if they found Navarro guilty of counts two and three, whether those offenses were committed on separate dates. The jury concluded the thefts were committed on separate dates beyond a reasonable doubt. The court thus sentenced Navarro as a non-repetitive offender for count one, a category-one repetitive offender for count two, and a category-two repetitive offender for count three.[9]

[9]The trial court also sentenced Navarro as a category-two repetitive offender for the eight forgery counts. After sentencing, Navarro filed a motion pursuant to Rules 24.2(a) and 24.3, Ariz. R. Crim. P., arguing that all of her offenses "were part of a common scheme or plan," and, absent a jury

¶41 "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *see also Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000). As relevant here, a person convicted of "multiple felony offenses that were not committed on the same occasion but that . . . are consolidated for trial purposes" is sentenced as a "category one repetitive offender for the second offense, and as a category two repetitive offender for the third and subsequent offenses," and, therefore, subject to higher sentencing ranges than a first-time offender. § 13-703(A); *see also* § 13-702.

¶42 Whether Navarro's offenses had been committed on the same occasion pursuant to § 13-703(A) either had to be "submitted to the jury, inherent in the jury's verdicts, or otherwise excepted from *Alleyne* and *Apprendi*." *State v. Flores*, 236 Ariz. 33, ¶ 5 (App. 2014); *see Alleyne*, 570 U.S. at 126 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (quoting *Apprendi*, 530 U.S. at 490)); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (defendant entitled to separate jury finding if fact not already reflected in verdict or admitted by defendant).

¶43 Whether offenses are committed on the same occasion requires a consideration of "1) time, 2) place, 3) number of victims, 4) whether the crimes were continuous and uninterrupted, and 5) whether they were directed to the accomplishment of a single criminal objective." *State v. Kelly*, 190 Ariz. 532, ¶ 6 (1997); *see also Flores*, 236 Ariz. 33, n.2 (noting *Kelly* factors are exclusive). In doing so, we consider only "the indictment, jury verdict forms, and elements of the offense, or 'some comparable judicial record of this information.'" *State v. Ortiz*, 238 Ariz. 329, ¶ 69 (App. 2015) (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

¶44 Turning first to the two theft charges, the jury's verdict forms show it determined that counts two and three "were committed on different dates," thus satisfying the first factor. Both that jury finding along with the different dates within an eight- to nine-month time span for these counts in the indictment also show this was not "continuous and uninterrupted" conduct. *See Kelly*, 190 Ariz. 532, ¶ 6; *see also Ortiz*, 238 Ariz. 329, ¶ 75

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finding, she should not have been sentenced as a repetitive offender. The court rejected her argument as to the fraud and theft charges, but resentenced her as a non-repetitive offender on the forgery counts.

(offenses cannot be "continuous and uninterrupted" if they occur on separate dates); *Flores*, 236 Ariz. 33, ¶ 10 ("continuous and uninterrupted" means no "appreciable lapse of time or intervening event" present between offenses). Lastly, the second factor is also inherent in the verdicts because the jury found Navarro guilty of the counts "as alleged" in the indictment, which named S.B. as the sole victim. *See Flores*, 236 Ariz. 33, ¶¶ 7-8. The fact that the victim was the same, however, is insufficient on its own to support a finding the offenses were committed on the same occasion when they otherwise occurred on separate dates and at separate locations. *Ortiz*, 238 Ariz. 329, ¶ 78.

¶45 The remaining *Kelly* factors—location of the offenses and Navarro's criminal objective—are not inherent in the verdicts. We may, however, review for harmless error. *See Ortiz*, 238 Ariz. 329, ¶¶ 70-71. "Error may be harmless if the state can show no reasonable jury would have failed to find the facts necessary to enhance the defendant's sentence." *Id.* ¶ 71. As to the former, Navarro either cashed or deposited the checks at separate branches of her bank. Thus, the location for each crime was different.[10] *See State v. Shulark*, 162 Ariz. 482, 485 (1989) (crimes not committed on same occasion where defendant attempted to cash forged checks "at different branches" of same bank).

¶46 Navarro argues that a single criminal objective is evidenced "by the single count of fraud that encapsulates all the other charges." But this argument does not address whether the two theft charges were aimed at the accomplishment of a single criminal objective. Although the general motive was the same in each theft—to steal S.B.'s money—"that does not necessarily mean each incident was aimed at a single criminal objective." *Ortiz*, 238 Ariz. 329, ¶ 77; *see also Flores*, 236 Ariz. 33, ¶ 11 ("[S]cheme to commit multiple crimes in order to make money is [not] a single criminal objective."). It was not necessary for Navarro to complete the first theft to complete the second theft, and she did not need to complete both in order to fulfill her motive of stealing S.B.'s money. *See Ortiz*, 238 Ariz. 329, ¶ 77.

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[10]Navarro asserts the location of the crimes was S.B.'s house, where Navarro received the checks. Theft occurs when a person, "without lawful authority," knowingly "[c]ontrols property of another with the intent to deprive the other person of such property." A.R.S. § 13-1802(A)(1). Here, Navarro did not control S.B.'s money until she deposited or cashed the checks. *See State v. Shearer*, 164 Ariz. 329, 341 (App. 1989) (commission of theft satisfied when defendant "in fact removed the money from the lockers with the intent to steal it").

Moreover, the long period over which each theft occurred, in conjunction with the fact that each theft was comprised of multiple checks written at different times, suggests that Navarro's plan to steal S.B.'s money was "open-ended" and dependent upon her access to S.B., rather than a directed, specific amount committed in a single, distinct offense. *See State v. Perkins*, 144 Ariz. 591, 597 (1985) (classifying "vague and potentially open-ended conspiracy as an 'occasion' . . . would not promote the policies of" § 13-703(A)), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 288 (1987); *see also State v. Vild*, 155 Ariz. 374, 375-77 (1987) (conspiracy to sell cocaine and possession of cocaine for sale not on same occasion where conspiracy vague and began months before arrest for possession). Consequently, the evidence established that there was not a single criminal objective between the two thefts.

¶47 Moreover, even if there was a single criminal objective here, the remaining *Kelly* factors weigh in favor of finding the thefts did not occur on the same occasion. *See Flores*, 236 Ariz. 33, ¶ 12 (single criminal objective not alone dispositive in analyzing if offenses occurred on same occasion). Section 13-703(A) is directed at crime "spree[s]" in which several crimes are committed over a very short period as part of a "'single criminal episode.'" *State v. Henry*, 152 Ariz. 608, 611-12 (1987) ("The common meaning of the phrase 'same occasion' is same time, same place."); *see, e.g.*, *State v. Sheppard*, 179 Ariz. 83, 84-85 (1994) (theft and trafficking offenses committed on same occasion when defendant stole car and delivered it to undercover officer same day); *State v. Rasul*, 216 Ariz. 491, ¶¶ 20-24 (App. 2007) (arson and conspiracy to commit arson on same occasion when committed on same day against same victims); *Derello*, 199 Ariz. 435, ¶¶ 10-16 (unlawful flight and prohibited possession on same occasion when defendant shot convenience store clerk during robbery and fled in vehicle leading to high-speed chase); *State v. Bedoni*, 161 Ariz. 480, 482, 486 (App. 1989) (driving under influence and forgery committed on same occasion when driver gave false name during traffic stop).

¶48 Conversely, the thefts here were committed by conducting many transactions at different locations on different dates over a long period of time. *See State v. Shearer*, 164 Ariz. 329, 341-42 (App. 1989) (theft and fraudulent schemes spanning several-month period not committed on same occasion); *see also State v. Schneider*, 148 Ariz. 441, 448-49 (App. 1985) (interrelated thefts not committed on same occasion when spanning nineteen months and involving different victims). Based on the evidence, no reasonable jury would have failed to find that the theft counts occurred on separate occasions. *See Ortiz*, 238 Ariz. 329, ¶ 71.

¶49 Navarro also contends the trial court erred by finding the fraudulent schemes and artifices count occurred on a separate occasion from the theft counts because "they are ultimately the same offense." The state does not address this issue in its answering brief. For the following reasons, we agree with Navarro.

¶50 The fraudulent schemes count was based on the same conduct that formed the basis for the theft counts: Navarro continued taking checks from S.B. despite no longer providing services, thereby unlawfully depriving S.B. of her money. Indeed, the evidence the state used to prove the fraud was the same used to prove the thefts. *Cf. Perkins*, 144 Ariz. at 595, 597-98 (despite occurring over ninety minutes, crimes not on same occasion when different evidence and eyewitnesses used to prove each incident); *Ortiz*, 238 Ariz. 329, ¶ 77 (crimes not on same occasion where state relied on different evidence to prove each). Further, the fraud and theft counts happened during the same period against the same victim, and the theft was the method by which Navarro committed fraud. *See Rasul*, 216 Ariz. 491, ¶¶ 23-24 (single criminal objective where arson and conspiracy to commit arson "related to the same ultimate act"); *see also Sheppard*, 179 Ariz. at 84-85 (single objective where car theft "motivated by the same criminal objective as the trafficking: to provide the undercover officer with the specific car he ordered"); *Noble*, 152 Ariz. at 286-87 & n.2 (single criminal objective where defendant kidnapped child to carry out objective of molesting her). Accordingly, the trial court erred by concluding the fraud count did not occur on the "same occasion" as either of the theft counts. § 13-703(A); *see Derello*, 199 Ariz. 435, ¶ 8. We therefore vacate the sentences on these three counts and remand for resentencing. Navarro shall be sentenced as a non-repetitive offender on counts one and two and a category-one repetitive offender on count three.

Double Jeopardy

¶51 Navarro lastly argues the trial court violated the prohibition against double jeopardy because her theft convictions are multiplicitous. She reasons that there can only be "a single conviction" because the "single offense" was based on "aggregated takings that were all part of the same scheme." Because Navarro did not raise this issue until her motion to vacate the judgment and sentence, we review for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Mendoza*, 181 Ariz. at 474. Multiplicitous counts may nonetheless constitute fundamental error by violating constitutional principles of double jeopardy. *State v. Nereim*, 234 Ariz. 105, ¶ 22 (App. 2014).

¶52 The Double Jeopardy Clauses of the federal and state constitutions bar multiple convictions for the same offense. U.S. Const. amend. V; Ariz. Const. art. II, § 10; *see State v. Veloz*, 236 Ariz. 532, ¶ 4 (App. 2015). "Multiplicity occurs when an indictment charges a single offense in multiple counts." *State v. Powers*, 200 Ariz. 123, ¶ 5 (App. 2001).

¶53 As relevant here, a "person commits theft if, without lawful authority, the person knowingly . . . [c]ontrols property of another with the intent to deprive the other person of such property." A.R.S. § 13-1802(A)(1). "In determining the classification of the offense, the state may aggregate in the indictment or information amounts taken in thefts committed pursuant to one scheme or course of conduct, whether the amounts were taken from one or several persons." A.R.S. § 13-1801(B).

¶54 To determine if the theft convictions are multiplicitous, we must consider whether Navarro embarked on separate and distinct courses of conduct. *See State v. Via*, 146 Ariz. 108, 116 (1985). In *Via*, our supreme court rejected a multiplicity challenge to two charges of fraudulent schemes and artifices where the fraud consisted of using two stolen credit cards issued by different banks. *Id.* The court explained:

> Admittedly, the removal of the victim's credit cards constituted only one act. Defendant, however, subsequently embarked upon what could only be construed as two separate courses of conduct, each involving a distinct scheme to defraud a bank using a different credit card. The crime of fraudulent schemes and artifices requires that a defendant act with the specific intent to defraud. Defendant may have had the same general intent in each count—to defraud banks using stolen credit cards. There was, however, a specific and separate victim, as well as a specific and separate credit card, in each count. There was then specific intent to defraud twice, once as to each card and bank. Charging under two counts was not, therefore, multiplicitous.

Id. (citation omitted).

¶55 Here, the state alleged that Navarro committed two counts of theft by unlawfully controlling money from S.B.'s separate checking accounts at two different banks—Wells Fargo and U.S. Bank—with the intent to deprive S.B. of that money. Like the defendant in *Via*, Navarro may have had the same general intent with regard to each account, but she nonetheless caused S.B. a separate and distinct harm as related to the Wells Fargo and U.S. Bank accounts. Moreover, the state alleged that the thefts occurred over two different periods, spanning eight and nine months. *See State v. Davis*, 206 Ariz. 377, ¶ 65 (2003) (two acts approximately eleven days apart not part of single transaction). And the jury specifically found that the thefts "were committed on different dates." We thus conclude, as we did above, that Navarro embarked on two separate courses of conduct.

¶56 Navarro nevertheless suggests that the thefts constitute "one scheme" because there was only one victim, S.B. She therefore reasons that "§ 13-1801(B) requires that only one conviction be entered." But we have already concluded that this was not a single "course of conduct"; § 13-1801(B) thus does not apply. In addition, construing § 13-1801(B) the way Navarro proposes would lead to an absurd result: a defendant who commits one theft would be insulated from prosecution for additional discrete thefts committed against the same victim. *See State v. Barragan-Sierra*, 219 Ariz. 276, ¶ 17 (App. 2008) (when construing statutory language, "[w]e employ a common sense approach, reading the statute in terms of its stated purpose and the system of related statutes of which it forms a part, while taking care to avoid absurd results"). Accordingly, we conclude Navarro's theft convictions are not multiplicitous and no double jeopardy violation occurred. *See Escalante*, 245 Ariz. 135, ¶ 21; *see also Mendoza*, 181 Ariz. at 474.

Disposition

¶57 For the foregoing reasons, we vacate Navarro's sentences on counts one through three and remand for resentencing, but otherwise affirm her convictions and remaining sentences.